No. 80-881

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

TEMA OIL COMPANY and ASHLAND EXPLORATION, INC.,
Petitioners

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF OF PETITIONERS, TEMA OIL COMPANY AND ASHLAND EXPLORATION, INC.

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REPLY BRIEF OF PETITIONERS, TEMA OIL COMPANY AND ASHLAND EXPLORATION, INC.

I

This case involves a request by Tema Oil Company and Ashland Exploration, Inc. (collectively referred to herein for convenience as "Ashland") for review of a novel standard of review which has been adopted by the D.C. Circuit in connection with an agency interpretation case. Ashland showed in its petition for a writ of certiorari that the Court of Appeals' new standard conflicts with this Court's established standard of review for agency interpretation cases because the new standard upholds agency interpretations that are inconsistent with the underlying regulation if the agency interpretation does not appear irrational (Pet. 7-8). Ashland also showed that the Court of Appeals' new standard improperly per-

mits agencies to circumvent the Administrative Procedure Act by allowing agencies to amend their regulations in the guise of issuing interpretations (Pet. 8-10). Finally, Ashland showed that the Court of Appeals' new standard is unworkable since it requires a petitioner to elect at its peril what evidence would satisfy the subjective judgment of the reviewing court that the agency's interpretation is "irrational" (Pet. 11-12).

In its answer to Ashland's petition, the Solicitor General does not refute any of the foregoing adverse consequences which Ashland showed will flow from application of the Court of Appeals' novel standard of review. Instead, the Solicitor claims that Ashland "misconceived" the holding of the Court of Appeals and that no novel standard of review is involved (Ans. 4). According to the Solicitor, "[t]he court's reference to 'irrationality' was in answer to petitioners' claim that the Commission's interpretation was contrary to its stated policy objectives, and not to the question whether the Commission's interpretation was inconsistent with the new regulation itself" (Id.). Thus, under the Solicitor's theory, a distinction may somehow be drawn between the policy objectives of a regulation and the regulation, itself, such that an interpretation might be inconsistent with the stated policy objectives of the regulation but yet be consistent with the regulation.

Simply to postulate the Solicitor's thesis demonstrates its error. There can be no substantive distinction between an agency regulation and the underlying policy objectives of that regulation. The policy objectives and the regulation must be synonomous. If they are not, then the regulation does not carry out its *raison d'être* and is itself invalid. Clearly, if an agency's claimed interpretation of a regulation is inconsistent with the policy objec-

tives of that regulation, then the interpretation is also inconsistent with the regulation, itself.

The Court of Appeals below did not attempt to draw the distinction which the Solicitor now seeks to draw, nor did it perceive any difference between the Commission's rollover regulation and its underlying policy objectives. As the Court of Appeals found (Pet. App. 4a, 8a), the Commission's rollover regulation is totally devoid of any reference to whether the purchasers under the expired and replacement contracts must be the same. In the absence of such specific reference, the Court of Appeals recognized the necessity to look to the policy objectives of the Commission's rollover regulation in order to test the consistency or inconsistency of the Commission's interpretation which would interpose an identity-of-purchaser requirement. Indeed, the Court of Appeals recognized that the Commission's rollover regulation and such regulation's policy objectives are one and the same. Consequently, the Court of Appeals' holding (Pet. App. 8a) could be rewritten to substitute "rollover regulation" for "stated policy objectives" as follows: "only if the Commission's interpretation were so at odds with its rollover regulation as to render its determination irrational would this Court set that order aside." Thus contrary to the Solicitor's current claim (Ans. 4), the Court of Appeals was addressing the validity of the Commission's interpretation of the rollover regulation when it held that "only if the Commission's interpretation were so at odds with its stated policy objectives as to render its determination irrational would this court set that order aside." (Pet. App. 8a).[1] Unquestionably, the Court of Appeals

[1] The Solicitor claims that the Court of Appeals correctly held that the Commission's proposed interpretation met one of the stated policy objectives since the disqualification of producer contracts where the purchasers had changed reduced the number of sales entitled to rollover treatment (Ans. 5-6). It is submitted that this contention actually turns the Commission's rollover policy

has employed a new standard of review wherein an agency interpretation may be sustained regardless of its consistency with the underlying regulation.

II

WHEREFORE, Ashland reaffirms its request that a writ of certiorari be issued in this case.

Respectfully submitted,

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on its head. Under such contention, a pipeline which continues to purchase gas at contract rollover must pay an increased price for its continued purchase, but where a new purchaser acquires the gas it is not required to pay an increased price. How this result serves to ameliorate economic dislocations to consumers of gas, particularly those which continue to acquire gas at contract rollover, is difficult to perceive.